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No. 91-1744

In The
Supreme Court of the United States
October Term, 1991

GALAXY COMMUNICATIONS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S BRIEF IN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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September 23, 1992

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Pursuant to Rule 15.6 of the Rules of this Court, Petitioner Galaxy Communications, Inc. ("Galaxy") respectfully submits this brief in reply to the United States' and the Federal Communications Commission's Brief in Opposition to Galaxy's Petition for Writ of Certiorari.

THE CONGRESSIONAL BAR TO RE-EXAMINATION OF THE MINORITY PREFERENCE POLICY WAS ABSOLUTE

The FCC denied Galaxy's application for a construction permit for a new FM radio station in Delaware solely because Galaxy's owner was not a member of a favored racial group. The government's Brief in Opposition relies principally on the contention that Galaxy's petition may not be heard by the Court because Galaxy did not, in the government's view, exhaust its remedies before the agency by raising there the constitutional question presented here.

The government cites the exhaustion requirement of Section 405(a) of the Communications Act of 1934, as amended, in support of its position. Section 405(a) provides that a party seeking judicial review of an agency decision may not rely on "questions of fact or law upon which the Commission ... has been afforded no opportunity to pass." 47 U.S.C. § 405(a).

As Galaxy pointed out in its petition, however, it was not Galaxy but Congress which deprived the Commission of the "opportunity to pass" on Galaxy's equal protection claim. Petition at 17. In the appropriations Acts, cited in the government's Opposition at 8 and n.4, Congress forbade the Commission from expending any funds to change or reexamine, *inter alia*, the minority preference policy that relegated Galaxy to second position in the proceeding before the Commission.

There is no indication that Section 405(a) was intended to cover the instant situation, and none of the circuit court opinions cited at page 9 of the Opposition sprang from an absolute bar on the agency's ability to examine an equal protection claim. It would offend the most elemental concept of due process for Congress to insist on presentation of a constitutional argument to an agency

where Congress itself has taken away the opportunity for agency consideration of that argument. Exhaustion of administrative remedies is not required where "the only available administrative procedure ... must be regarded as inappropriate and inadequate and therefore need not be pursued." *Greene v. U.S.*, 376 U.S. 149, 163 (1963).

The United States and the FCC advocate imposition of an exhaustion requirement here because "[h]ad petitioner raised its claim administratively, the Commission would have been able to respond to the contention that it applied a "*per se* preference" in this case. Opposition at 8-9. However, the very exercise the government describes clearly falls within the kinds of activity prohibited by the appropriations Acts. Congress did not exempt any such examination of the constitutional dimensions of the minority preference from its absolute bar on reexamination of the minority preference.

GIVEN CONGRESS' EXPLICIT DIRECTIVE, IT WOULD HAVE BEEN WHOLLY FUTILE FOR GALAXY TO HAVE PRESSED ITS CONSTITUTIONAL CHALLENGE BEFORE THE FCC

The government imagines that the Commission could have "addressed whether the appropriations Acts could be narrowly interpreted to avoid the constitutional question presented," Opposition at 9, but that statement is a *non sequitur*. The Commission could not have addressed Galaxy's constitutional claim while at the same time "avoiding" it. Nor could the Commission have complied with the Congressional mandate embodied in the appropriation Acts by disguising what would, in reality, have been a further examination of the minority preference policy as merely "narrow" statutory interpretation.

In any event, following the language of Section 405(a), the Commission did have the "opportunity to pass" on the key questions of law presented by Galaxy's appeal.

In its appeal before the full Commission, Galaxy argued for greater weight to be placed on its superior technical proposal. The service to be provided to an area which will not receive the signal of the minority-owned station is important to Galaxy's showing of the illogical nature of reliance on the minority preference in the instant case. Of course, for the Commission to have placed greater emphasis on comparative coverage would have had the effect of weakening the minority preference policy by comparison, so it is not surprising that the Commission relegated the discussion of comparative coverage to a footnote in its *Memorandum Opinion and Order*. *See* Petition at Appendix A, page 28a, n.9.

Further, while Galaxy's application was pending before the Commission, Galaxy filed a brief *amicus curiae* with this Court in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), explicitly addressing the constitutionality of the minority preference policy. That brief was served on the Commission, whose opportunity to pass on the constitutional question was limited only by the fact that this Court was considering that question at the time. It is also remarkable that the United States not only must have "considered" Galaxy's position at that time but agreed with it.

The government as much as concedes that Galaxy cannot be required to have exhausted its general constitutional challenge to the minority preference because of the futility of raising such a point at the Commission level. *See* Opposition at 8. However, the government contends that Galaxy should have raised administratively its argument that the minority preference, as applied here, resulted in a *per se* preference. As shown above, the appropriation Acts would have rendered such an effort just as futile as a general objection to the constitutionality of the minority preference.

In sum, as the result of the appropriations Acts there was "no properly authorized administrative procedure" for

Galaxy to exhaust at the Commission. In such a context, exhaustion is not required. *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535 (1954).[1]

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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[1] The government's argument that the Court need not take up the constitutionality of a *per se* minority preference at this juncture because the policy may disappear from the FCC's licensing scheme, in light of the Commission's current re-evaluation of its method of awarding licenses, is invalid. The FCC has made clear its intention to apply any new integration formula prospectively. Accordingly, Galaxy's constitutional challenge remains ripe.